IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR
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ORDER

Roop Singh Jodha
vs
State of Rajasthan & Ors.

S.B. CIVL WRIT PETIITON NO.4713/2002 UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER : 24th August, 2006

PRESENT

HON'BLE MR.MOHAMMAD RAFIQ,J.

REPORTABLE

Mr.Sandeep Shah, Advocate, for the petitioners.
Mr.Rameshwar Dave, Dy. Government Advocate for the respondents.

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BY THE COURT: -

The petitioner in this writ petition has challenged the adverse remarks entered in his Annual Confidential Report for the year 1999-2000 and has prayed for quashment of order dated 23.10.2000 (Annex.1) containing adverse remarks and order dated 5.9.2002 (Annex.3) whereby the representation submitted by the petitioner against such adverse remarks was rejected.

Briefly stated facts of the case are that the petitioner was initially appointed as Constable in the Rajasthan Armed Constabulary on 5.10.1969. The petitioner thereafter appeared in the written and practical test held for the purpose of selection on the post of Platoon Commander under the Rajasthan Home Guards Service and on being declared successful by the Special Board constituted for the purpose, he was appointed on the post of Platoon Commander on 9.10.1980 and since then he was working satisfactorily. There was no adversity in his service record till date. He was then promoted on the post of Company Commander on 16.11.1996. It has also been stated that the petitioner had undergone various training courses conducted by the department and other institutions and had successfully completed such courses with good grades. Apart from this, the petitioner was also awarded various cash rewards and appreciation certificates by the department in recognition of the outstanding work done by him. It has been stated that the APARs of the petitioner pertaining to the year 1999-2000 was down graded by his superior officer and adverse remarks therein were communicated to him by office order dated 23.10.2000 (Annex.1. The petitioner stated that a bare perusal of the communication would reveal that the assessment given by the Reporting Officer was 'very good' and 'good' in all the fields and he further stated that the petitioner 'showed interest in his

work', was 'reliable', 'showed compassion towards persons belonging to Scheduled Caste and Schedule Tribes' and that the petitioner was never reprimanded during the entire year nor was his integrity ever found doubtful. The over all assessment done by the Reporting Officer was 'good' and the Reviewing Officer agreed with the assessment of the Reporting Officer. But strangely, the Accepting Officer communicated certain grave adverse remarks to the petitioner in which it has been stated that he "has grown very fat and can not work as a good trainer. The Reporting and Reviewing Officer have not taken this into consideration. He has to cut down his fat and must work harder than he has. He must learn the art of discipline and should respect his senior. He is an unsatisfactory officer." The petitioner submitted his representations against these remarks, but the respondent no.2 without objectively considering the representation and without assigning any reason passed order dated 5.9.2002 whereby he rejected the representation and affirmed the adverse entries communicated to the petitioner.

Shri Sandeep Shah, learned counsel for the petitioner has argued that there is no adversity whatsoever during the entire service period of the petitioner. It has also been argued that the Accepting Officer had no occasion to watch performance of the petitioner from close distance and, hence, there was no reason

for him not to accept the remarks made by the Reporting Officer as well as Reviewing officer. It has also been submitted that no opportunity of hearing was given to the petitioner before making such adverse remarks. It was not possible for the Accepting Officer to get to know a large number of employees three grades below him for their overall assessment of the character, performance and ability of the reported officer which is vitally necessary as a built of character. He has also argued that it is settled law that when the opinions regarding adverse entries are confirmed, recording of detailed reasons may not necessary, but they are necessary when a dis-agreement is recorded. He has also argued that adverse entries pertain to the period from 1.4.1999 to 2.8.1999 and just prior to this period, the petitioner had been medically examined and was found fit and was further sponsored by the department as its representative to appear in the 'Basic Fire Fighting Course' held in Nagpur between 15.2.1999 to 26.3.1999. The petitioner appeared in this course and was placed in fist class. Further more, the petitioner had also appeared in 'Promotional Cadre Course' held by the department form 13.7.1998 to 18.8.1998 and was placed in 'BX' grade. It has therefore been argued that the Accepting Authority was wrong in coming to the conclusion that the petitioner is very fat and cannot work as a good trainer. In support of of his arguments, Shri Sandeep Shah, learned counsel for the

petitioner has relied upon the judgments of the Hon'ble Supreme Court delivered in the case of U.P. Jal Nigam & Ors. Vs. Prabhat Chandra Jain & Ors reported in JI 1996 (1) SC 641 wherein the Hon'ble Supreme Court held as under : -

> "if the graded entry is of going a stop down, like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both are a positive grading. All what is required by the Authority recording confidentials in the situation is to record reasons for such down grading on the personal file of the officer concerned, and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would not frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, be not reflected in such variations, as otherwise they shall be communicated as such. It may be emphasised that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instance case we have seen the service record of the first respondent. No reason for the change is mentioned. The down grading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam, we do not find any difficulty in accepting the ultimate result arrived at by the High Court."

The writ petition has been contested by the respondents, who in the reply have come out with the plea that the respondents have rightly rejected the representation submitted

by the petitioner. Shri Rameshwar Dave, learned Dy. Government Advocate argued that petitioner was given warnings vide order dated 7.9.1990 and 11.3.1991 for remaining negligent towards duty. He has further argued that the Accepting Officer has rightly observed that the petitioner has grown very fat and cannot work as a good trainer due to his fatness and the adverse remarks were also recorded to the effect that he must learn the art of discipline and should respect his seniors and he is an unsatisfactory officer. Since the petitioner was a trainer in Home Guards Department, therefore, his excessive fatness was creating hurdle in performance of his duties effectively. He has also argued that even though the petitioner did not submit his representation in time, however, the respondents after objectively considering the material available on record affirmed the adverse entires communicated to the petitioner. It has therefore been prayed that the writ petition be dismissed.

I have heard learned counsel for the parties and perused the record.

So far as contention of the respondent that the petitioner has been given warring on two occasions respectively on 7.9.1990 and 11.3.1991 is concerned, they are old one and the

same would not be relevant for the purpose of deciding the present controversy.

The assessment given by the Reporting Officer in respect of the petitioner was 'very good' and 'good' in all the fields and that the petitioner 'showed interest in his work', was 'reliable', 'showed compassion towards persons belonging to Schedule Caste and Schedule Tribes'. The petitioner was never reprimanded during the entire service career nor was his integrity ever found doubtful. But a perusal of the communication dated 23.10.2000 (Annex.1) would show that the Accepting Officer has opined that the petitioner has grown very fat and cannot work as a good trainer and he should cut down his fat and must work harder than he has. He has also opined that he must learn the art of discipline and should respect his senior, but nothing has been brought on record as to how he is unfit, indisciplined and disregarded his seniors. The respondents have also not brought on record any instance or instances as to how the performance of the petitioner was rated unsatisfactory by the Accepting Officer.

It is trite law that an officer entrusted with duty to write confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately

while giving, as accurately as possible, on statement of facts, an overall assessment of the performance of the Reporting Officer. However, at the same time, the Reporting Officer before forming an opinion adverse to the Subordinate Officer should confront the officer with such information and then only the same may be made part of the report. Reference in this connection may be made to the following observation of the Hon'ble Apex Court in State of U.P. Vs. Yamuna Shanker Misra reported in 1997 (4) SCC 7: -

> "....The Officer entrusted with the duty to writ confidential reports, has a public responsibility and trust to write the confidential reports objectively, fairly and dispassionately while giving, as accurately as possible, the statement of facts on an over all assessment of the performance of the Subordinate officer. It should be founded upon facts or circumstances.
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> Before forming an opinion to be adverse, the Reporting Officers writing confidential should share the information which is not a part of the record with the officer concerned, have the information confronted by the officer and then make it part of the record. This amounts to an opportunity given to the erring/corrupt officer to correct the errors of the judgment, conduct, behaviour, integrity or conduct/corrupt proclivity. If, despite being given such opportunity, the officer fails to perform the duty, correct his conduct or imporve himself, necessarily the same may be recorded in the confidential reports and a copy thereof supplied to the affected officer so that he will have an opportunity to know the remarks made against him."

On the same line, the Hon'ble Apex Court in Union of India Vs. E.G. Nambudiri reported in 1991(3) SCC 38 held as under:-

> "....Therefore, in the absence of any statutory rule or statutory instructions requiring the competent authority to record reasons in rejecting a representation made by a Government servant against the adverse entries the the competent authority is not under any obligation to record reasons. But the competent authority has no licence to act arbitrarily,it must act in a fair and just manner. It is required to consider the questions raised by the Government servant and examine the same, in the light of the comments made by the officer awarding the adverse entries and the officer countersigning the same. If the representation is rejected after its consideration in a fair and just manner, the order of rejection would not be rendered illegal merely on the ground of absence of reasons. However, it is does not mean that the administrative authority is at a liberty to pass orders without there being any reasons for the same. In Governmental functioning before any order is issued the matter is generally considered at various levels and the reasons and opinions are contained in the notes on the file. The reasons contained in the file enable the competent authority to formulate its opinion, if such an order is challenged in a Court of law, it is always open to the competent authority to place the reasons before the Court which may have led to the rejection of the representation. If is always open to an administrative authority to produce evidence aliunde before the Cort to justify its action."

Their Lordships of the Hon'ble Supreme Court in M.A. Rajasekhar Vs. State of Karnataka reported in 1996 (10) SCC 369 were considering somewhat similar remarks recorded in the

confidential report of the appellant that he "does not act dispassionately when faced with dilemma" it was in this context their Lordships in para no.4 of the judgment observed as under:-

> "It is now settled law that object of making adverse remarks is to assess the competence of an officer on merits and performance of an officer concerned so as to grade him in various categories as outstanding, very good, good, satisfactory and average, etc. The competent authority and the reviewing authority have to act fairly or objectively in assessing the character, integrity and performance of the incumbent."

Having recapitulated the law on the subject, their Lordships in para no.5 further observed as under: -

> "It was found that his integrity has not doubted and his work also in all those respects was found to be satisfactory. Under those circumstances, the remarks that he "does not act dispassionately when faced with dilemma" must be pointed out with reference to specific instances in which he did not perform that duty satisfactorily so that he would have an opportunity to correct himself of the mistake. He should be given an opportunity in the cases where he did not work objectively or satisfactorily. Admittedly, no such opportunity was given. Even when he acted in a dilemma and lacked objectivity, in such circumstances, he must be guided by the authority as to the manner in which he acted upon. Since this exercise has not bee done by the respondents, if would be obvious that the above adverse remarks was not consistent with law."

Their Lordships of the Hon'ble Supreme Court in Sukhdeo Vs. The Commissioner Amravati Division, Amravati & Anr reported in JT 1996 (5) SC 477 while following the earlier judgment in State Bank of India etc. VS. Kashinath Kher & Ors etc (JT 1996 (2) SC 569 at 578 observed as under: -

> "the controlling officer while writing confidential and character role report, he should be a superior officer higher above the cadres of the officer whose confidential reports are written. Such officer should show objectivity, impartiality and fair assessment without any prejudice whatsoever with highest sense of responsibility to inculcate in the officer's devotion to duty, honesty and integrity so as to improve excellence of the individual officer. Lest the officers get demoralised which would be deleterious to the efficacy and efficiency of public service. In that case it was pointed out that confidential reports written and submitted by the officer of the same cadre and adopted without any independent scrutiny and assessment by the committee was held to be illegal. In this case, the power exercised is illegal and it is not expected of from that high responsible officer who made the remarks. When an officer makes the remarks he must eschew of making vague remarks causing jeopardy to the service of the subordinate officer. He must bestow careful attention to collect all correct and truthful information and give necessary particulars when he seeks to make adverse remarks against the subordinate officer whose career prospect and service were in jeopardy. In this case, the controlling officer has not used due diligence in making remarks. It would be salutary that the controlling officer before writing adverse remarks would give prior sufficient opportunity in writing by informing him of the deficiency he noticed for improvement. In spite of the opportunity given if the officer/employee does not improve then it would be an obvious fact that would form material basis in support of the adverse remarks. It should also be mentioned that he had given prior opportunity in

> waiting for improvement and yet was not availed of so that it would form part of the record."

In the facts of the present case also, it would be evident from the record that adverse remarks to the effect that the petitioner has "grown very fat and cannot work as a good trainer due to his fatness and he must learn the art of discipline and should respect his senior and he is an unsatisfactory officer" have not been recorded with reference to any specific instance in which he did not perform his duties satisfactory and should indiscipline or disrespect to his services. Not only this, it has also not been recorded nor even asserted before this Court that in spite of being required to correct himself, he did not improve. This was necessary also because the kind of adverse remarks recorded by the Accepting Officer had the effect of severely down grading the remarks originally given by the Reporting Officer and approved by the Reviewing Officer. A comparison in contrast between two sets of such remarks reflect that the later remarks would adversely effect the career prospects of the Reported Officer. In the present case no reasons have been assigned by the respondents in their counter as to why Accepting Officer recorded impugned remarks which are in quite contrast with those recorded by the Reporting Officer and Reviewing Officer. While the Accepting Officer had no opportunity to closely monitor and watch the performance of the petitioner

but it is a fact that the Reporting Officer who is his immediate superior officer could very well assess his performance from close distance. Remarks given by the Reporting Officer have been approved by the Reviewing Officer. If at all the Accepting Officer wanted to record adverse remarks which had the effect of downgrading the remarks given by Reporting and Reviewing Officer, he should have at least briefly recorded the reasons in support of such remarks and inform the petitioner about the change in the form of an adversity. This was all the more necessary because the Reported Officer did not work under direct supervision of the Accepting Officer. Such adverse remarks cannot therefore be held to be legal and justified.

This Court had an occasion to examine the instructions regarding Annual Performance Apparisal, 1976 in Richpal Singh VS. State reported in 1992(2) WLC 669. While following the principles laid down by Hon'ble Apex Court in State of Haryana VS. P.C. Wadhwa, reported in AIR 1987 SC 1201, this Court held that even if the administrative instructions issued by the Government are not having statutory force,they must be substantially complied with. The Government which had issued the instructions and the officers, who are bound to act in conformity with the administrative instructions and whose actions are the actions of the Government, must be held to be

bound by these administrative instructions. The administrative authorities, which declare that their actions will be governed by certain standards must adhere to those standards. Arbitrary departure from such instructions will vitiate the action taken by such authorities. Faced with the problem of non adherence to such instructions especially in the context of the cases where positive reports given by the Reporting Officers are down graded or are recorded in the negative form by Reviewing/Accepting Officer,the Government has issued a circular on 3.4.1998, which is worth reproduction : -

> "It has been observed that the APARS of the State Service Officers are sometimes downgraded by Reviewing/Accepting authority, without giving any reasons or justifications and it becomes difficult to properly defend such cases in Courts. The Supreme Court has also recently held that proper reasons must be recorded while down grading the APAR rating of a Reportee Officer. Accordingly it has been decided that the Reviewing/Accepting authorities should invariably record detailed reasons/justifications if APARs of the Reportee Officers are downgraded by them."

Remarks in the APARS of a government servant play a significant role in his service career. While good remarks may help him gain timely promotion, adverse remarks may delay such promotion and in some cases, may even permanently mar the changes of such promotion. It is true that the compliance of principles of natural justice in the sense of giving notice and

providing opportunity of hearing cannot be insisted upon in the matter of recording of adverse remarks. At the same time, however, desirability of applying those principles at least in some semblance has always been impressed upon the executive by series of judicial pronouncements. This is based on sound principles of fairness and transparency in administrative action. Such a course is required to be adopted so as to rule out any possibility of arbitrariness and colourable exercise of power. The Government of Rajasthan has issued the APAR Instructions of 1976 with an avowed objective of adherence to these very principles of law. Guidelines contained in these instructions insist on objectivity of assessment rather than subjectivity of the officer making such assessment. They are intended to safeguard interest of the government servants so that no prejudice is caused to them by any possible bias on the part of the officer recording remarks in his APAR.

In view of the foregoing discussion, the writ petition is allowed and the orders dated 23.10.2000 (Annex.1) and dated 5.9.2002 (Annex.3) are quashed and set aside. Consequences to follow.

There shall be no order as to costs.

(MOHAMMAD RAFIQ), J.

c.p.goyal/-